82736-2

Supreme Court No. ____
(COA No. 60265-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MONDAY, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Kevin Monday, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Monday seeks review of the Court of Appeals decision dated December 23, 2008, a copy of which is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Evidence gathered as the result of a search or arrest warrant must be suppressed when the warrant application contained intentional or reckless omissions of material facts that undermine the probable cause determination under the Fourth Amendment and Washington Constitution, Article I, § 7. When the witnesses who provide the probable cause to search and arrest a person are themselves centrally implicated in the offense, it is reckless for the police to omit the witnesses' personal interest in exculpating themselves by identifying another person as the perpetrator?

2. Did the Court of Appeals misapply the pertinent standard of reviewing reckless, material omissions from a warrant application by failing to strike the allegations given the warrant application's failure to explain that its accusations came from plainly biased witnesses with significant personal motives to accuse another person of by the perpetrator?

3. When a court gives instructions defining self-defense, proposed by the defense attorney, which inaccurately explain the law of self-defense and confuse the legal standard for the jury, does the failure to make an available defense manifestly apparent to the average juror constitute ineffective assistance of counsel and violate the Sixth Amendment?

4. Does the failure to define a "firearm" for the jury, as required by the statute authorizing enhanced punishment for a person armed with a firearm, constitute error that may not be found harmless by a reviewing court on appeal?

5. Does the imposition of enhanced punishment based on the trial judge's finding that various offenses constituted separate and distinct serious violent offenses, violate the Sixth and Fourteenth Amendments?

D. STATEMENT OF THE CASE.

Kevin Monday was charged with and convicted of first degree murder and two counts of first degree assault based on allegations he was shot three men following a fight in Pioneer Square, in Seattle. CP 222-25. He received a sentence of 773 months imprisonment for these convictions. CP 253-61. A street performer captured a portion of the fight and shooting on videotape, although the videotape did not clearly show the facial features of the shooter, and it alone could not establish the perpetrator's identity. 5/15/07RP 23; 5/16/07RP 148-49.

During his jury trial, the prosecutor engaged in a variety of tactics found "improper" by the Court of Appeals, but for which the Court of Appeals refused to find prejudicial to Monday's right to a fair trial. The Court of Appeals also found clear error in defense counsel's proposal of an incorrect jury instruction defining the law of self-defense, but also decided this error was harmless. The Court of Appeals likewise agreed that with the trial court that the application for a search warrant omitted pertinent facts undercutting the allegation that Monday was the shooter, but found these omissions harmless. Finally, the Court of Appeals conceded that the court did not properly instruct the jury on the definition of a

"firearm" for purposes of the firearm sentencing enhancement added to each offense of conviction, but decided the error was harmless.

The facts are further set forth in the Court of Appeals opinion, pages 1-3, Appellant's Opening Brief, pages 5-6, Appellant's Reply Brief, and throughout the relevant argument sections of each. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT.

1. BY WITHHOLDING CRITICAL INFORMATION TO OBTAIN A SEARCH AND ARREST WARRANT, THE STATE VIOLATED MONDAY'S RIGHTS UNDER THE FOURTH AMENDMENT AND THE WASHINGTON CONSTITUTION, ART. I, § 7.

a. A search or arrest warrant may not be predicated on information offered with a reckless disregard for the truth. The Fourth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 7 of the Washington Constitution protect citizens from unreasonable searches and seizures and provide that a search warrant may only be issued upon a showing of probable cause. Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); State v.

Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); U.S. Const. amends. IV[1] & XIV; Wash. Const. Art. I, §§ 3,[2] 7.[3]

When a warrant affiant uses intentional or reckless perjury to secure a warrant, "a constitutional violation obviously occurs" because "the oath requirement implicitly guarantees that probable cause rests on an affiant's good faith." State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978). The affidavit or other evidence submitted in an application for a search warrant must set forth the facts and circumstances the police assert create probable cause, so the issuing judge or magistrate may make a detached and independent evaluation of whether probable cause exists. Thein, 138 Wn.2d at 140

If the defendant establishes the affiant's intentional or reckless disregard for the truth by a preponderance of the

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[1] The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] The Fourteenth Amendment and Article 1, § 3 guarantee due process of law.

[3] Article 1, § 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

evidence, the court must add the material omissions; and if the modified affidavit then fails to establish probable cause, the warrant is void. Franks, 438 U.S. at 155-56. The court must then suppress evidence obtained as a result of the warrant. Id.

b. The warrant application contained multiple material omissions critical to evaluating probable cause. In its findings of fact, the trial court admitted the warrant affidavit contained inaccuracies and mistakes, and the Court of Appeals agreed. But both courts inexplicably downplayed the importance of the information omitted.

The warrant application alleged Monday was the shooter based on the claims of two people, a boyfriend-girlfriend couple named Antonio Sanders and Annie Sykes. Critically, the affidavit did not mention the significant personal motives of Sanders and Sykes to lie on the grounds that they themselves had been implicated in the shooting and faced potential criminal liability as accomplices. CP 55-56.

Nowhere in the affidavit did the police tell the issuing magistrate that Sanders had been identified as the shooter by an eyewitness; that he had been arrested because of this allegation; or that he remained in jail, ostensibly on a probation violation but in

reality due to his suspected involvement in the shooting. The affidavit did not explain that Sanders had identified Monday only after his long-term "baby" Sykes had pointed a finger at Monday. The day after Sykes told police, albeit equivocally, that Monday was the shooter, Sykes' mother told police that she and Sykes had visited Saunders in jail after Sykes' police interview, discussed the shooting with him, and Saunders wanted to give the police a new account of events. 5/3/07RP 103. The warrant application did not explain the immediate connection between Sykes and Sanders's joint identification of Monday.

The police had spent an entire day pressuring Sykes to identify the shooter and they "disbelieved" her throughout their interview until she tentatively identified Monday as the shooter, yet instead of conveying their disbelief, the warrant application falsely boosted her identification of Monday. 5/3/07RP 93. The warrant application claims Sykes "knew" the shooter as "Monday," yet Sykes had told police she met this man for the first time on the night of the incident and was unsure of his name. 5/3/07RP 40.

These and other lapses in the affidavit detailed in the briefing below were not simply negligent oversights, but rather showed a concerted effort to hide material information from the

issuing magistrate that would have significantly undercut the allegations that Monday was the shooter. After striking the dubious accusations by Sanders and Sykes as motivated by self-interest and self-preservation, all the police had was a photograph of Monday showing that he had a body built similarly to the shooter shown in the videotape. This information may be grounds to investigate Monday but not probable cause to arrest him.

Furthermore, the mere fact that the police knew the identity of Sanders and Sykes did not excuse them from setting forth the basis of their reliability. A known informant is presumed credible only when that person is "uninvolved" in the offense or a victim. State v. Rodriguez, 53 Wn.App. 571, 574, 769 P.2d 309 (1989). The credibility of information is critical to establishing probable cause, and the warrant application must establish the informant's credibility on its face. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 114 (1984). A heightened showing of credibility is required when the informant is a criminal informant or has a significant penal interest in the case. See Rodriguez, 53 Wn.App. at 575-76. A cohort or accomplice's allegations against another suspect are inherently suspicious. See Lilly v. Virginia, 527 U.S. 116, 133, 119

S.Ct. 1887, 144 L.Ed.2d 117 (1999) (suspect's statements alleging other's involvement have "presumptive unreliability").

The Court of Appeals refused to acknowledge the material nature of the omissions by finding that vague statements in the warrant application that the witnesses were uncooperative and had changed their stories sufficiently conveyed the bias of the witnesses. The warrant application did not contain any actual admission that these witnesses faced personal criminal liability, and in fact, stated that the witnesses' reluctance was because of fear of retaliation as opposed to its more likely origin as fear of prosecution.

The Court of Appeals applied an incorrect standard in denying that the plainly reckless omissions from the search warrant were material to the probable cause finding. Similar analytic failures are likely to recur and this Court should take review of the case to provide further explanation of how to weigh plainly material omissions from a warrant application based on the accusers' potential criminal liability in assessing whether the warrant should be deemed invalid by virtue of misleading information presented to a magistrate.

2. WHERE DEFENSE COUNSEL PROPOSED A LONG-DISFAVORED AND INCORRECT JURY INSTRUCTION DEFINING SELF-DEFENSE, MONDAY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The prosecution correctly conceded Monday's attorney was deficient by asking for a jury instruction incorrectly explaining the legal standard for Mr. Monday to have acted in self-defense. Slip op. at 11-13; Resp. Brf. at 29. The resulting prejudice denied Monday his right to effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6;[4] Wash. Const. art. 1, § 22.[5]

a. Defense counsel requested an incorrect and repeatedly criticized jury instruction defining self-defense. Proposing an incorrect jury instruction is presumptively deficient. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) ("A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases."). There is no tactical or

[4] The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense."

strategic reason to propose an instruction that incorrectly states the law. State v. Woods, 138 Wn.App. 191, 156 P.3d 309, 314 (2007) (in light of case law on issue, "there was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law."); State v. Rodriguez, 121 Wn.App. 180, 187, 87 P.3d 1201 (2004) (no conceivable or strategic reason to propose incorrect and disfavored self-defense instruction).

All jury instructions setting forth the law of self-defense must make the relevant legal standard manifestly apparent to the average juror. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); see State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Because the jury is not expected to know which instruction is correct, a single incorrect instruction undermines the validity of the instructions as a whole. State v. Cowen, 87 Wn.App. 45, 50-52, 939 P.2d 1249 (1997) (ambiguity created by single incorrect self-defense instruction could affect verdict and requires reversal). It is erroneous to instruct the jury that in order to find an accused person acted in self-defense, it must find he or she feared "great bodily harm." Even in a homicide case, a defendant does

[5] Art. I, § 22 provides in part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, . . . [and] to have a speedy public trial by an impartial jury . . . ."

not have to establish that he reasonably feared "great bodily harm" to justify the use of deadly force. State v. Freeburg, 105 Wn.App. 492, 505, 20 P.3d 984 (2001). Instead, the use of deadly force is justified of he or she reasonably feared "great personal injury." Walden, 131 Wn.2d at 477; Freeburg, 105 Wn.App. at 505.

The "great bodily harm" standard used in the case at bar in Instruction 37 has been repeatedly criticized. CP 209; Walden, 131 Wn.2d at 475; Woods, 156 P.3d at 314; Freeburg, 105 Wn.App. at 505, 507; State v. Corn, 95 Wn.App. 41, 49-50, 975 P.2d 520 (1999) (using "great bodily harm" standard incorrectly increases threshold for establishing self-defense). "Great bodily harm" improperly increases the degree of injury a defendant must fear before his or her actions may be legally justified, and instead the court should use the phrase "great personal injury." Freeburg, 105 Wn.App. at 504.

Here, defense counsel proposed an incorrect self-defense instruction and the court gave the instruction as requested. CP 209 (Instruction 37); CP 147 (Defense proposed instruction). Instruction 37 provided:

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual

> danger of **great bodily harm**, although it afterwards might develop that the person was mistaken as to the extent of the danger.
>
> Actual danger is not necessary for a homicide to be justifiable.

CP 209 (emphasis added). Another instruction explained when a homicide is justifiable, including the requirement that:

> (1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
> (2) the slayer reasonably believed that there was imminent danger of such harm being accomplished;

CP 207 (Instruction 35). These instructions confused the legal standard for self-defense and since jurors are not expected to know the correct standard, this error prejudicially denied Monday the right to a fair trial by jury. U.S. Const. amends. 6 & 14; Wash. Const. Art. I, §§ 21 & 22.

b. The incorrect jury instruction undermines confidence in the outcome of the case. An attorney's deficient performance requires reversal when there is a reasonable probability that the outcome could have been different without the error. Cronic, 466 U.S. at 654; In re Pers. Restraint of Hubert, 138 Wn.App. 924, 932, 158 P.3d 1282 (2007) (ineffective assistance where court's instructions did not make available defense "inevitabl[y]" apparent). A defendant is not required to prove that

he would not have been convicted but for the error. See e.g., House v. Bell, 547 U.S. 518, 552-53, 126 S.Ct. 2064, 2086, 165 L.Ed.2d 1 (2006) (reversing for ineffective assistance based on new evidence where, even though jury might disregard new evidence, it "would likely reinforce doubts" as to defendant's guilt).

In the case at bar, Monday's claim of self-defense rested on his perception that he faced an imminent injury from a gun or a retaliatory attack by Francisco Green and the passengers in the car. 5/29/07RP 52. Monday feared the car's passengers were going to either give Green a gun or attack him, and that is what prompted him to shoot. The videotape itself shows Francisco running to the car and saying, "Chris, get out of the car, get out of the car, they're trying to jump me." 5/16/07RP 149. Monday did not actually struggle over a firearm and necessarily face imminent deadly force, and thus, self-defense rested upon his perception that he was about to either be confronted by a firearm or attacked by the men, and the latter would not met the "great bodily harm" definition but could have been seen as a reasonable fear of serious injury, the proper legal standard for self-defense.

The self-defense instructions were plainly erroneous and have been repeatedly criticized as improperly diluting the State's

burden of proof. The harm from the error is also plain, as the instructions made it impossible for the jury to find Monday acted in self-defense if he feared an injury less than the threat of death. The State's case against Monday was riddled with uncooperative untrustworthy witnesses. 5/14/07RP 86. Even the people who were shot did not want to give the police any information about the incident. 5/14/07RP 85-88. The videotape does not capture the entire incident and cannot cure the conflicting and unconvincing testimony offered by eyewitnesses. Because it is reasonably likely that the verdict would have been different had the court given clear and accurate instructions defining self-defense, as it constitutionally required, this Court should accept review.

3. THE PROSECUTOR'S REPEATED, FLAGRANTLY IMPROPER APPEALS TO RACISM AND FLOUTING OF HIS PERSONAL PRESTIGE CONSTITUTED PREJUDICIAL MISCONDUCT DEPRIVING MONDAY OF A FAIR TRIAL

The Court of Appeals agreed that the trial prosecutor made numerous improper statements during his closing argument but concluded the offending remarks were not so prejudicial. However, the Court of Appeals downplayed the powerful impact of the prosecutor's appeal to race-based decision making, and the astounding array of flagrantly improper comments combined

multiple wrong-headed appeals to the jury, rise to the level of a patently unfair taint on the fairness of the proceedings as required by the state and federal constitutional rights to a fair trial by jury.

a. The prosecutor denies an accused person right to a fair trial by repeatedly urging deliberations based on potently improper considerations. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict based on matters in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1934); State v. Echevarria, 71 Wn.App. 595, 598, 860 P.2d 420 (1993). Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. Donnelly v. DeChrisoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Prosecutorial misconduct requires reversal when the improper conduct is substantially likely to affect the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where improper statements are not objected to, reversal is still required when the misconduct is so flagrant and ill-intentioned that no jury instruction would have cured the problem. Id.

b. The prosecutor impermissibly used racist allegations and impersonations. Remarks suggesting that the jury take race into account "can violently affect a juror's impartiality and must be removed from the courtroom proceeding to the fullest extent possible." United States ex rel. Haynes v. McKendrick, 481 F.2d 152, 157 (7th Cir. 1973); see United States v. Hernandez, 865 F.2d 925, 928 (7th Cir. 1989) (noting that race-conscious arguments draw the jury's attention to a characteristic the federal constitution generally demands the jury ignore).

The Court of Appeals expressed "great frustration" that the prosecutor invoked "invoked race in his closing argument and affected an accent when questioning Sykes," but found the arguments insufficiently prejudicial to require reversal. Slip op. at 19. The Court of Appeals minimized the harmful nature of the remarks by rationalizing them, holding that because the prosecution relied on testimony from two African-American witnesses, the prosecution's racist attacks would also have undermined their credibility. Slip op. at 19-20. This diminishment of the impropriety completely misses their devastating and nature.

The point of the prosecution's argument was that its own witnesses could not be trusted because they were "black folk" and

"black folk" are inherently untrustworthy when it comes to testifying against another black person. The prosecutor claimed that no witnesses, including his own, testified that Monday was the shooter because they all followed the "code," that "black folk don't testify against black folk." 5/30/07RP 29, 109-10. The prosecutor urged the jury to forgive its failure to offer more convincing proof against Monday based on the race of its witnesses. This race-based decision-making sought by the prosecutor is plainly improper by virtue of its mere delivery by a public prosecutor. Appeals to race, as well as mocking a witness based on the witness's accent, have no place in a courtroom and cannot be minimized as simply poor form when they undermine not only the fairness of the proceedings, but also the appearance of a fair and unbiased judicial system.

c. The vast array of prosecutorial error in the case at bar cumulatively denied Monday a fair trial. In addition to the race-baiting tactics of the prosecutor, he engaged in an array of flagrantly improper tactics.

In his opening statement, the prosecutor assured the jury that the State would not "falsely accuse[ ]" any person. 5/10/07RP(opening) 13; see e.g., Washington v. Hofbauer, 228 F.3d 689, 701-02 (6th Cir., 2000) ("always improper" to suggest

defendant's guilt predetermined prior to trial); United States v. Splain, 545 F.3d 1131, 1134-35 (8th Cir. 1976) ("serious transgression" to suggest would not prosecute unless believed defendant guilty). The objection to this remark was sustained, but the prosecutor repeatedly told the jury throughout the trial that it was his job to determine the truth, thus emphasizing his personal role in assessing Monday's guilt. See Opening Brief. P. 52-53 (detailing additional efforts by prosecutor to inject self into case person who determines truth and personal involvement in case).

The prosecutor told the jury that based on his personal experience prosecuting murder cases, he learned that whatever any criminal defendant says, it is "inherently unreliable." 5/30/07RP 26-27. He called the inherent unreliability of a criminal defendant a "tenet" of all prosecutions and also named it the "theme" of the case. 5/30/07RP 59. This argument is contrary to the well-established rule prohibiting prosecutors from offering a personal opinion on the veracity of any witness.

Additionally, the prosecutor's "position of trust and experience in criminal trials may induce the jury to accord unwarranted weight to his opinions regarding the defendant's guilt." United States v. Splain, 545 F.2d 1131, 1135 (8th Cir. 1976). The

prosecutor may not suggest that his or her opinion rests on evidence beyond that presented at trial. Id. The prosecutor's emphasis on his extensive experience, credentials, and personal conclusions as to the credibility and trustworthiness of a person accused of a crime was grossly improper and inherently prejudicial.

The prosecutor also started his closing argument by gratuitously referring to his 18 years of service for Norm Maleng, the long-time elected prosecutor who had suddenly died a few days before the closing argument, which was another ill-intentioned effort to secure juror sympathy on impermissible grounds. 5/30/07RP 26-27.

The prosecutor further vouched for the strength of his case by telling the jury that it was a "tenet" of good prosecutors that it was hard to think of a good closing argument in a "really, really, really strong" case like this case. 5/30/07RP 27, 30-31. Such personal opinions are improper devices to secure a conviction and impermissibly encourage a conviction based on the experienced prosecutor's personal opinion. Brooks, 508 F.3d at 1210.

Finally, the evidence in the case was far from overwhelming and the prosecutor's misconduct was planned and purposeful. The police conceded the videotape was blurry, significant action takes

place outside of the camera's lens as the people come and go from the picture, and the nature of the argument leading to the shooting simply cannot be discerned. 5/3/07RP 24-25, 110. No witnesses affirmatively identified Monday or explained what occurred with reason, logic, and consistency. Although Monday gave a statement expressing sorrow for his involvement, the circumstances of the case remained remarkably murky. The State's underhanded and flagrantly improper efforts to secure a verdict on means that have been long-discredited require reversal.

The line of what is acceptable rhetoric and what cannot be countenanced in a case marred by blurry videotape and an array of conflicting witness accounts should be drawn here, by finding the improper comments unduly harmful. Cumulative error requires reversal under the state and federal constitutional rights to due process of law. U.S. Const. amends. 6 & 14; Wash. Const. Art. I, §§ 3, 22.

4. THE JURY INSTRUCTIONS FAILED TO DEFINE THE ESSENTIAL ELEMENTS OF A FIREARM ENHANCEMENT

Under RCW 9.94A.533(3), a court may impose a five-year sentencing enhancement when the jury finds the offender "was armed with a firearm as defined in RCW 9.41.010." RCW

9.41.010(1) defines a firearm as, "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." A weapon that appears to be a firearm does not satisfy the essential elements of the firearm sentencing enhancement.

Here, the jury was never instructed on the essential elements of a firearm sentencing enhancement. Instead, the prosecutor referred to the enhancement as a "deadly weapon enhancement," and the court offered an instruction only on the definition of a deadly weapon, which does not include the critical language from RCW 9.41.010(1). CP 221 (Instruction 46).

The jury instruction explained the essential requirements of a deadly weapon enhancement. but did not provide the elements of the firearm enhancement or the definition of a firearm that is critical to the imposition of the firearm enhancement. The instruction only asked the jury to determine whether Monday possessed a deadly weapon. RCW 9.94A.533(3) permits a firearm enhancement only if the offender "was armed with a firearm as defined in RCW 9.41.010." There was no jury finding of this essential element. The Court of Appeals found this instructional error harmless, because the victims were shot with a firearm, but this essential

factual finding may not merely be assumed by the court reviewing the case on appeal. See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). It is improper for a reviewing court to say that despite some procedural error in the consideration of evidence the factfinder would have reached the same factual determination. A reviewing court may not assess the evidence to determine if the sentencing court would have or even could have reached the same decision.

Where sentencing errors have turned on factual errors or errors in the procedure by which the sentencing court considered the proof, remand has always been required. State v. Beals, 100 Wn.App. 189, 997 P.2d 941, rev. denied, 141 Wn.2d 1006 (2000). Here, the firearm enhancement was not found based on a properly instructed jury and remand is required.

5. THE COURT'S IMPOSITION OF INCREASED PUNISHMENT ABSENT A JURY'S VERDICT ON THE NECESSARY FACTUAL ELEMENTS REQUIRES REVERSAL.

In State v. Cubias, 155 Wn.2d 549, 120 P.3d 129 (2005), the Court decided a finding that crimes involve "separate and distinct" criminal conduct, triggering the imposition of consecutive sentences, need not be submitted to a jury and proven beyond a

reasonable doubt under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Here, Monday received enhanced punishment predicated on the trial court's factual determination that he committed separate and distinct serious violent offenses. For the reasons argued in Appellant's Opening Brief, this Court should find that the trial court's enhancement of Monday's sentence based on factual findings by the trial court violates the Sixth and Fourteenth Amendment's right to a fair trial by jury.

F. CONCLUSION.

Based on the foregoing, Petitioner Kevin Monday respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 21st day of January 2009.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KEVIN L. MONDAY, JR., Appellant.	No. 60265-9 DIVISION ONE UNPUBLISHED OPINION FILED: December 22, 2008

APPELWICK, J. — Kevin Monday appeals his conviction of one count of murder in the first degree and two counts of assault in the first degree, all with firearm enhancements. He appeals, arguing that the warrant affidavit recklessly omitted information, thereby undermining probable cause for his arrest and the search of his home; that he was denied effective assistance of counsel when his attorney suggested, and the court gave, a jury instruction that misstated the law of self-defense; and that the prosecutor committed misconduct. He also claims his sentence was erroneously entered. Because none of the claimed errors prejudiced his right to a fair trial, we affirm.

Facts

At 3 a.m. on April 22, 2006, a large crowd gathered in Seattle's Pioneer Square, located at Yesler and Occidental. Following an argument and physical altercation with

other individuals, Francisco Green was shot while standing next to a silver Mazda. Christopher Green and Michael Gradney were shot while seated inside the Mazda. Seattle police responded to reports of the shooting, finding Francisco Green face down in the street, shot several times. Seattle police encountered an uncooperative crowd. Before emergency medical personnel arrived, Francisco Green was driven by bystanders to Harborview Medical Center. Francisco Green died from four gunshot wounds to the back, chest, and arm. Christopher Green and Gradney survived their injuries. Christopher Green suffered a gunshot to the leg. Michael Gradney was shot in the arm and chest.

At the scene of the shooting, Seattle Police recovered ten .40-caliber cartridge casings from a semi-automatic handgun. Police also recovered a video of the events on April 22, 2006, including the altercation and shooting. The video shows a large, African American male dressed in a red shirt and wearing a red hat reveal a handgun. The man then shoots multiple times. Francisco Green is then heard proclaiming that he has been shot.

Initially, an individual identified Antonio Saunders as the shooter. Shortly after the identification, Saunders was arrested and booked into King County Jail for outstanding warrants. Saunders initially denied being at Pioneer Square during the shooting. Seattle Police contacted Annie Sykes, Saunders' girl friend, who initially also denied being at Pioneer Square on the night of the shooting. On May 9, 2006, Seattle Police again contacted Sykes. According to Police, at this interview Sykes identified Monday as the shooter, by both naming him and picking his photo from a montage. But, in her identification Sykes equivocated. Seattle Police Detective Weklych believed

Sykes was frightened of retaliation for the identification. In a subsequent interview, Saunders also identified Monday as the shooter.

Seattle police obtained a search and arrest warrant. At Monday's home, police found .40 caliber bullets and clothes similar to those worn by the shooter. On May 15, 2006, Seattle Police arrested Monday. Detectives interviewed Monday, who initially denied being present at the shooting. After the police confronted Monday with a still photo from the video, Monday admitted he was indeed present at Pioneer Square on the night of the shooting and wearing red clothing. But, he claimed he ran away when the shots were fired. Eventually, Monday confessed to the shooting, but claimed he had seen a gun in Francisco Green's hands before he fired.

The King County Prosecutor's Office charged Monday with one count of murder in the first degree for the death of Francisco Green, one count of assault in the first degree for the shooting of Christopher Green, one count of assault in the first degree for the shooting of Michael Gradney, and one count of unlawful possession of a firearm in the second degree. A jury trial was held in King County Superior Court in May 2007 on the first three counts. On May 31, 2007, the jury found Monday guilty. The jury found he was armed with a firearm on all of the three counts. The trial court, conducting a simultaneous bench trial, also found Monday guilty of one count of unlawful possession of a firearm in the second degree. The trial court sentenced Monday to a standard range sentence totaling 773 months. The sentence included a mandatory firearm enhancement. Monday timely appealed his conviction and sentence.

Discussion

I. Search Warrant

Monday contends that the trial court erred in denying his motion to suppress evidence seized pursuant to the warrant and his confession, because the affidavit upon which the search warrant was issued was deficient. Specifically, he contends that police omitted material information about the informants from the affidavit for the search warrant, thereby rendering the affidavit deficient, the search warrant invalid, and requiring suppression of the evidence obtained in the resulting search.

A search warrant may be issued only when there has been a determination of probable cause. State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). "Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." Atchley, 142 Wn. App. at 161 (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). In determining probable cause, the magistrate makes a practical, commonsense decision, and is entitled to draw reasonable inferences from all the facts and circumstances set forth in the affidavit. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

The decision to issue a search warrant is an exercise of judicial discretion. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A reviewing court "generally gives great deference to the magistrate's determination of probable cause and view[s] the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically." State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

Accordingly, appellate courts will generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. Id. at 484.

In State v. Chenoweth, the Washington Supreme Court recently addressed a similar challenge to a search warrant affidavit that also relied on information from an informant. The court held that a defendant must show reckless or intentional omission of material information to invalidate a search warrant. Chenoweth, 160 Wn.2d at 479; see also Franks v. Delaware, 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Garrison, 118 Wn.2d 870, 873-74, 827 P.2d 1388 (1992) (A mere showing of omission is insufficient to invalidate a warrant). The court opined that, "[s]crutinizing a warrant affidavit for evidence of negligent omissions or misstatements is . . . inconsistent with our State's established jurisprudence governing search warrant challenges." Chenoweth, 160 Wn.2d at 477. The Chenoweth decision reiterated that, "[a] search warrant is entitled to a presumption of validity." Id.

Accordingly, to succeed on a claim of intentional or reckless omission, a defendant must allege a deliberate falsehood or a reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. Franks, 438 U.S. at 171. In the offer of proof, the defendant should point out specifically the portion of the warrant affidavit that is claimed to be false; and it should be accompanied by a statement of supporting reasons. Id.

Monday claims that the affidavit: 1) failed to disclose the interests of Antonio Saunders and Annie Sykes; 2) failed to disclose material information about Sykes interactions with police; and 3) failed to discuss that another informant positively identified Saunders as the shooter.

This court adopted the rule articulated in United States v. Davis, 617 F.2d 677, 694 (D.C.Cir.1979), "that recklessness is shown where the affiant 'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit. Under Davis, such serious doubts can be shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports." State v. O'Connor, 39 Wn. App. 113, 117, 692 P.2d 208 (1984)(quoting Davis, 617 F.2d at 694). "Essentially the same analysis applies to information intentionally or recklessly omitted from affidavits." O'Connor, 39 Wn. App. at 118 (citing United States v. Martin, 615 F.2d 318 (5th Cir.1980)).

Here, in its written findings of fact and conclusions of law on the Criminal Rule (CrR) 3.6 motion to suppress physical and oral evidence, the trial court concluded that "[t]he affidavit, while it could have been more precise, does correctly convey to the reviewing court that the identification of the defendant was made by two uncooperative witnesses."

First, Monday claims that Detective Weklych, the affiant, failed to disclose the interests of Saunders and Sykes in the case. Monday asserts that the magistrate should have been informed that Saunders was in jail, because he had been identified as the shooter, thereby creating his obvious bias and self-interest to name Monday. But, Saunders had been arrested on outstanding Department of Correction warrants, not in connection with the shooting. By the time Saunders was interviewed by the police, the police had discounted the eye witness account that initially identified Saunders as the shooter. Additionally, the video tape confirmed that Saunders did not match the physical description of the shooter. From the police perspective, Saunders was not a

suspect. It is not clear from the record whether Saunders knew if he was or was not a suspect when he identified Monday. At the CrR 3.6 hearing, Monday failed to establish that Saunders was motivated to name him based on his self-interest. The warrant informed the magistrate that Saunders had initially denied he was present, but eventually told the police this was a lie.

Monday argues that the affidavit should have stated that Saunders changed his testimony after a visit by Sykes' mother. The record contains no information regarding this meeting. Monday asks the court to speculate as to what occurred at a meeting. There is insufficient proof that the meeting between Sykes' mother and Saunders caused him to identify Monday.

Monday also asserts that the affidavit failed to describe Sykes' self-interest. The record does not indicate that Sykes had a personal stake in the outcome of the case, either as to herself or because she feared Saunders was the suspected shooter and was protecting him. Instead, the record shows only that she was fearful of retaliation. The affidavit stated that Sykes was "frightened of retaliation for providing this information." Monday does not establish that Sykes was self-interested in the case. Therefore he failed to raise doubt about her truthfulness.

Monday argues that the affidavit failed to disclose material information about Sykes interactions with police. Specifically, he claims the affidavit should have indicated that the police attempted to talk with Sykes for several weeks prior to the interview where she identified Monday. The affidavit stated that "those who have spoken . . . have been extremely reluctant to provide information." Including the specific details about her interactions with police would have been redundant.

Next, Monday claims that the affidavit omitted material information regarding a prior identification of Saunders as the shooter. But, by the time the police sought the warrant, Saunders was no longer a suspect, because he did not match the physical description of the shooter. A prior misidentification of Saunders was not material to the warrant.

Monday fails to show there was an intentional or a reckless omission of information that undermines the finding of probable cause. Monday does not establish that the affiant deliberated about the information or had obvious reasons to doubt the veracity of the informants and the accuracy of their reports. Here, the affidavit contained all of the essential information, including statements that Saunders and Sykes changed their stories.

We hold that the trial court did not abuse its discretion in finding that while the affidavit contained some omissions, probable cause nevertheless existed.

Next, Monday claims the trial court erred when it failed to timely enter written findings of fact and conclusions of law on his CrR 3.6 motion. CrR 3.6 states that, "[i]f an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law." Although the CrR 3.6 hearing occurred in May 2007, the trial court did not enter its findings of fact and conclusions of law until a year later.

If the appellant can establish that he was prejudiced by the trial court's late entry of the findings of fact and conclusions of law, or that the findings and conclusions were tailored to meet the issues presented by the appeal, the Court of Appeals will reverse a trial court's failure to timely enter findings of fact and conclusions of law. State v. White,

141 Wn. App. 128, 137 n.3, 168 P.3d 459 (2007); State v. Glenn, 140 Wn. App. 627, 166 P.3d 1235 (2007).

Here, the trial court's oral ruling stated that the affidavit did omit some information, but nevertheless there was probable cause. The written findings entered nearly a year later reiterate that conclusion. The written findings do not contain differences with the oral ruling, nor do they appear tailored for this appeal. We hold that Monday has not established he was prejudiced by the delayed entry of written findings of fact and conclusions of law on the CrR 3.6 motion.

II. Jury Instructions

Monday contends he was denied effective assistance of counsel when his trial attorney proposed jury instructions that inaccurately stated when a person is entitled to act on appearances under the law of self-defense. Specifically, Monday claims his attorney was deficient when he proposed a jury instruction that stated a person could only act in self-defense if he or she feared great bodily harm, rather than great personal injury.

In order to establish ineffective assistance of counsel, the defendant must show (1) defense counsel's performance was deficient, and (2) the defense counsel's errors were so serious that they deprived the defendant of a fair trial. Strickland v. Wash., 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Self-defense is proper when a person who reasonably believes he or she is about to be injured uses force attempting to prevent an offense against oneself or another and employs not more than necessary force to do so. RCW 9A.16.020. Self-

defense is evaluated by the jury both objectively and subjectively. State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996).

The objective portion of the evaluation requires the jury to determine what a reasonably prudent person similarly situated would have done. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The subjective perspective requires that the jurors stand in the shoes of the defendant and consider all the facts and circumstances known to him or her. Id. The degree of force allowed in self-defense "is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); accord State v. Bailey, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979). The jury instructions must also make the law of self-defense "manifestly apparent to the average juror." Walden, 131 Wn.2d at 473. A jury instruction that misstates the law of self-defense is constitutional error and is presumed prejudicial. Walden, 131 Wn.2d at 473. We review jury instructions de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Monday proposed jury instructions relating to a claim of self-defense. Specifically, he proposed the court give a self-defense instruction based on Washington Pattern Jury Instructions section 17.04, which states:

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterward might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.04, at 203 (2d ed. 1994) (WPIC).

Monday also requested the court give WPIC section 2.04, which defines the term "great bodily harm." 11 WPIC 2.04, at 21. The court's instruction 41 to the jury defined great bodily harm as:

> Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

The instructions also stated that self-defense defense is not available to an aggressor and that if the "defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense." Other terms defined included substantial bodily harm, great personal injury, and great bodily harm.

Based on the Washington State Supreme Court's analysis in State v. Walden, the State concedes that Monday's trial counsel was deficient in proposing WPIC 17.04, because it required the defendant to perceive actual danger of great bodily harm instead of believing he was at risk for great personal injury.[1] Nonetheless, the State argues that the trial court's instructional error was harmless and Monday was not prejudiced. To succeed on a claim of ineffective assistance of counsel, Monday must show a reasonable probability that the outcome of the trial would have been different

[1] The Washington Supreme Court held "great bodily harm" was the improper instruction when a defendant is charged with first degree assault with use of deadly force and claims self-defense against an unarmed victim. State v. Walden, 131 Wn.2d 469, 476-78, 932 P.2d 1237 (1997). Specifically, in that case, the court held that the definition would seem to "exclude ordinary batteries" even if the defendant reasonably believed the battery at issue would result in great personal injury. Id. at 477. Instead, the court said jury instructions should use the term "great personal injury," defined as an injury that the defendant reasonably believed based on the facts and circumstances, known at the time, would produce severe pain and suffering if it were inflicted upon either the defendant or another person. *See* 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.04, at 203 (2d ed. 1994) (WPIC); WPIC 2.04.01, at 28 (supp. 2005).

absent the attorney's deficient performance. Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Monday did not testify at trial. But several police officers testified to Monday's station house confession where he admitted to the shooting. According to the officers, Monday stated that he "wasn't trying to kill that man, I didn't mean to take his life." Detective Weklych recalled that Monday described that after his altercation with Mr. Kidd, he witnessed Francisco Green "walking up to the car, then he heard gimmie that, gimmie that, and then he says he saw the passenger reach down and pull up a gun." According to Detective Weklych, Monday stated "I saw the guy outside the car point the gun at me and I shot him. I thought he was gonna' kill me." Based on the testimony of Detective Weklych, Monday believed he was about to be shot. No witnesses testified to seeing a gun, and no gun was recovered from the victims.

In State v. Freeburg, this court held that an instructional error identical to the one on appeal here was harmless, because "there is no likelihood whatsoever that use of the great bodily harm language affected the outcome here." 105 Wn. App. 492, 505, 20 P.3d 984 (2001). Freeburg's theory at trial was that he faced a threat of a gunshot at close range. Id. Accordingly, the court held this threat easily and obviously satisfies either the great personal injury or great bodily harm definitions. Id.

Monday claims the facts of this case are distinguishable from Freeburg. Specifically, he claims that Freeburg involved a struggle for a firearm and the threat of necessarily imminent death. Monday claims that he faced the threat of being attacked by Francisco Green and the two men in the car or confronted by a firearm. But, this argument mischaracterizes the only testimony at trial regarding the threat faced by

Monday. Detective Weklych testified that Monday shot Green and the other two victims, because he feared being killed, and that Green pointed a gun at him. There was no testimony that Monday feared a physical assault from Francisco Green or the occupants of the car. The jury standing in Monday's shoes would know that Monday believed Green was pointing a gun and about to shoot him. Fear of being shot satisfies the great bodily harm standard in the instruction. Like Freeburg, Monday has failed to establish a reasonable probability that the outcome of the trial would have been different absent the attorney's deficient performance.

We hold that correct jury instructions would not have altered the result; the instructional error was harmless.

III. Prosecutorial Misconduct

Monday contends that the prosecutor engaged in misconduct, depriving him of a fair trial. He points to four incidents as constituting misconduct.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing both the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). To establish prejudice, the defendant must show a substantial likelihood the instances of misconduct affected the jury's verdict. State v. Kendrick, 47 Wn. App. 620, 638, 736 P.2d 1079 (1987); see also State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where a defendant fails to object or to request a curative instruction, the error is considered waived "unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."

State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). An appellate court reviews alleged misconduct "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

First, Monday argues that the prosecutor improperly interjected his own experience and the prestige of the office in closing argument and also improperly stated that criminal defendants are inherently unreliable. The prosecutor stated:

> Seventeen years and eleven months ago yesterday I signed on, I signed on to serve at the pleasure of Norman K. Maleng. I never imagined in a million years I would get to try as many murder cases as I have in the last 15 years, and I never imagined I would ever get to try one, a doozy, like this one . . . . And two things stood out at me very shortly into my career as a prosecutor, two tenets that all good prosecutors, I think, believe. One is that when you have got a really, really, really strong case, its hard to come up with something really, really, really compelling to say. And the other is that the word of a criminal defendant is inherently unreliable. Both of those tenets have proven true time and time again over the years, and they have done it specifically in this case over the last five weeks -- four weeks.

Monday did not object to these statements. Defense counsel's failure to object to the remarks at the time that they are made "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." Swan, 114 Wn.2d at 661.

A prosecutor may not place the integrity of his or her office on the side of a witness's credibility. State v. Sargent, 40 Wn. App. 340, 343-4, 698 P.2d 598 (1985), reversed on other grounds by 49 Wn. App. 64, 741 P.2d 1017 (1987). Here, the prosecutor made a statement about his office and extensive experience. But, this statement was curable by objection and instruction. No objection was made. The error is waived.

Monday contends that the statement that criminal defendants are inherently unreliable was improper and prejudicial. A prosecutor may not assert his opinion about the credibility of the witness and the guilt or innocence of the accused. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (holding reversible error occurred when during closing argument, the prosecutor called the accused a liar and maligned defense counsel). While Monday had not testified, the detectives did testify to his statements that he shot the victims and believed one was about to shoot him. We agree with Monday that the comments were clearly improper and unprofessional. But, we do not think they created incurable prejudice and could not have been cured by objection and instruction. Monday did not object. The error is waived.

Second, Monday argues the prosecutor committed misconduct when he improperly stated, "the code is black folk don't testify against black folk. You don't snitch to the police." Monday failed to object. He argues the characterization of a code of silence among African Americans drew attention to race and belied the evidence presented at trial.[2]

A prosecutor has wide latitude to draw and express reasonable inferences from the evidence in argument. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Here, the prosecutor could reasonably infer from police testimony, which referred to a code of silence, and the testimony of the eyewitnesses that there was a code on the street not to snitch or testify.

[2] Monday does not cite any case law on point. He cites to State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), which addresses expert testimony about groups of people regarding race. Petrich has no application on the present issue.

But, Monday is correct that the testimony regarding a "code" did not refer specifically to African Americans; the prosecutor interjected this characterization. While the victim, the defendant, and the lay witnesses who testified were African American, asserting that the code was race based was not a proper inference from trial testimony. Moreover, a prosecutor's references to a defendant's race or otherwise seeking a conviction on racial bias is improper. State v. Avendano-Lopez, 79 Wn. App. 706, 717-718, 904 P.2d 324 (1995) (a prosecutor's questions about defendant's immigration status were improper because such an inquiry was irrelevant and appealed to prejudice); State v. Torres, 16 Wn. App. 254, 257, 554 P.2d 1069 (1976); State v. Suazez-Bravo, 72 Wn. App. 359, 367-68, 864 P.2d 426 (1994) (prosecutor's line of questioning concerning Suarez-Bravo's neighborhood, his Hispanic co-workers, his fears of deportation, and his status as a Hispanic non-citizen were improper).

Although the prosecutor's comments were improper, Monday does not establish they were prejudicial. Unlike Avendano-Lopez, the prosecutor's comments were not about Monday or his conduct. Instead, they described the reluctance of witnesses, including those called by the State, to identify that Monday was the shooter. The fact that the witnesses did testify, despite the described reluctance on the street to snitch or to testify, was used to strengthen the force of the argument. However, this is not an appeal to racial bias traditionally held contemptuous by the courts. Although the prosecutor's comments were improper, Monday does not establish they were prejudicial. Given the record before us, this statement was not so flagrant or ill intentioned that any concern about the racial implications could not have been cured by objection and instruction. Again, there was no objection, any error was waived.

Third, Monday claims the prosecutor offensively affected an accent, repeatedly stating "po-leese" while questioning a witness. In questioning Sykes, a State witness, the prosecutor, ten times over an extensive period of time, asked about her interactions with the "po-leese." Monday made no objection to the accent. Here, the prosecutor was questioning a State witness, who had previously identified Monday as the shooter. His accent occurred intermittently during the questioning. At times, the court reporter also transcribed the use of the term "po-leese" by the witness, Sykes. Again, the conduct of the prosecutor was improper. But, again, an objection could have prevented the repetition. Any prejudice could have been cured by admonition of the prosecutor and instruction to the jury.

Last, Monday claims that the prosecutor improperly positioned himself and his office in opening statements and the questioning witnesses. Specifically, Monday claims it was improper for the prosecutor to state in his opening argument that:

> You're going to learn that we take absolutely every single measure we can think of to make sure that no man is falsely accused, and no man is falsely convicted of something he didn't do.

Monday objected to these statements and the trial court sustained the objection.

"The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." Stenson, 132 Wn.2d at 719 (internal quotation marks omitted) (quoting State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). The trial court sustained the first objection and instructed the jury to disregard the argument of the prosecutor. Any misconduct in referring to his office was properly addressed by the trial court.

According to Monday, the prosecutor also repeatedly referenced his own involvement in the investigation of the case. When questioning Saunders, the prosecutor stated, "[b]ut, see, Mr. Saunders, when you start telling us that some of it is not true, it's my job to point out to the jury which part of what you are saying is true and which part isn't." Monday objected on the grounds the question was "argumentative." It was overruled by the trial court. In a later exchange with Saunders, the prosecutor stated that he was trying to determine how the statement to police and his current testimony differed. Monday's counsel did not object. The prosecutor also referred to his own presence at a police interview stating, "I said stop lying to us, we have it all on video." Monday objected. The trial court did not rule on the objection, but reprimanded the prosecutor saying "Mr. Konat, let's try to keep it down a little bit, and let the street language remain in the street." Monday did not renew the objection and seek a curative instruction. Monday argues that these statements indicate an attempt on the prosecutor's part to interject himself into the trial. These statements were improper, however by these statements the prosecutor did not vouch for the credibility of the witness or otherwise place the reputation of his office to assert the guilt of Monday.[3] Therefore, a renewed objection and request for a curative instruction could have cured this error as well.

Monday contends that the cumulative effects of the prosecutor's misconduct requires reversal. Monday argues that the prosecutor attempted to sway the jury with irrelevant information and by undercutting the testimony of African Americans. He relies on State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956). In Case, the defendant was

[3] Monday does not argue that these questions were, in fact, testimony on the part of the prosecutor.

charged with the crime of carnal knowledge. Id. at 68. At trial, the prosecutor made several derogatory statements about the defendant's character witness. Id. at 70. During closing argument, the prosecutor indicated his personal belief in defendant's guilt regarding the charges that he had raped his own daughter, introduced arguments not reasonably inferred from the evidence about sexual predators, and continued to interject his personal opinions into the trial, even after an objection by defense counsel and an admonishment by the court. Id. at 68-70. The Washington Supreme Court held that even where the defense failed to object to many of the instances of impropriety, the comments constituted prejudicial error, preventing a fair trial. Id. at 76.

This court finds great frustration that an otherwise solid trial performance by the prosecutor, which results in a conviction, is jeopardized by unnecessary and improper conduct. The prosecutor's actions in Monday's trial were clearly improper when he invoked race in his closing argument and affected an accent when questioning Sykes. But, we do not agree with Monday that the cumulative effects were sufficiently prejudicial to deny him a fair trial. The irrelevant comments by the prosecutor did not overcome the strong evidence against Monday presented at trial: Police detectives testified that Monday confessed to the shooting, Monday admitted to police that on the night of the shooting he wore a red shirt, several witnesses stated the shooter wore a red shirt, which the video shown to the jury confirmed. At Monday's home the police found shell casings that matched those used by the shooter on April 22, 2006. Here, the State relied on the eye-witness testimony of Saunders and Sykes, both African American. Any harm to the credibility of those witnesses from race based remarks

would have also hurt the State's case. The strength of the evidence overcame any prejudice from the comments and conduct of the prosecutor.

We hold that prosecutorial misconduct did not deprive Monday of a fair trial.

IV. Sentence Enhancement

Monday claims that the court's imposition of a 60-month sentence enhancement was invalid, because the governing statute lacks the necessary provisions to impose such an enhancement. He also argues that the jury was not properly instructed as to the essential elements of the firearm sentencing enhancement.

Monday argues that unlike RCW 9.94A.533(4), which provides a method for a deadly weapons enhancement to be pled and proven to the jury, a firearm enhancement lacks a statutorily proscribed procedure. Where no statutory procedure exists, Monday claims, the trial court usurped the role of the legislature by altering the sentencing procedure and submitting it to the jury. Therefore, the jury's finding on the special verdict form that Monday was armed with a firearm is constitutionally deficient.

Monday's argument was squarely rejected in State v. Recuenco, published after he filed his opening brief. 163 Wn.2d 428, 180 P.3d 1276 (2008). In Recuenco, the Supreme Court rejected a petitioner's claim that the legislature failed to create a statutory procedure by which a jury could find a firearm special verdict. Id. at 439. This court also addressed the issue of whether a statutory procedure exists for a jury to find a fire arm enhancement in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053, 187 P.3d 752 (2008); accord State v. Tessema, 139 Wn. App. 483, 162 P.3d 420 (2007), review denied, 163 Wn.2d 1018, 180 P.3d 1292 (2008). In Nguyen, the court rejected an argument identical to Monday's claimed error

when it held that RCW 9.9A.602 "authorizes a special allegation and jury finding as to whether the defendant was armed with a deadly weapon, which includes: '[b]lackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm.'" Nguyen, 134 Wn. App at 870 (quoting RCW 9.94A.602) (emphasis omitted). Therefore, the deadly weapon special verdict statute provides the requisite procedure. Id. at 870. We hold that the trial court did not err in submitting the firearm enhancement to the jury, because a statutory procedure exists.

Next, Monday claims that if a statutory procedure exists, then the jury was not properly instructed, because the jury was only instructed as to the essential elements of a deadly weapon enhancement, not the essential elements of a firearm enhancement. Monday does not contest any other part of the enhancement instruction.

Here, the jury was instructed that for the purposes of the special verdict the State must prove beyond a reasonable doubt that Monday was "armed with a deadly weapon at the time of the commission of the crimes in count I, II and III." Further, the instruction stated:

> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant . . . . In determining whether these connections exist, you should consider the nature of the crime, the type of weapon and the circumstances under which the weapon was found.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

The instruction given by the court is identical to the one proposed by Monday for the firearm enhancement.

According to Monday, the instructions given by the trial court explained the essential elements required of a deadly weapon enhancement, but did not provide the required firearm definition. He claims that under the deadly weapon enhancement a person could be found to use a weapon that appears to be a firearm, whereas such a weapon is not included in the definition of firearm. He argues that a trial court's failure to comply with the Sentencing Reform Act, in the absence of a waiver by the defendant, mandates reversal. Further, he states that harmless error analysis is only appropriate when the resulting sentence would not have changed as a matter of law. See State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).

The instruction given was the standard pattern jury instruction 2.07.02, defining "Deadly Weapon--Definition for Special Verdict--Firearms." 11 WPIC 2.07.02, at 46 (supp. 2005). Monday claims that the instruction should have included the definition of firearm contained in RCW 9.41.010(1). RCW 9.41.010(1) defines firearm as meaning "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Monday argues that the jury instructions did not specifically state that a firearm must be capable of firing projectiles by an explosive such as gun powder.

The State met its burden of proving that Monday was armed with a firearm, as defined in RCW 9.41.010(1).[4] Monday was charged with murder in the first degree by shooting Francisco Green with a .40 caliber semi-automatic handgun, as defined in RCW 9.41.010. He was charged with two counts of assault in the first degree for

[4] In State v. McKee, this court held that for purposes of a firearm enhancement, "the State must prove that the defendant was armed during commission of the crime with a 'firearm,' defined as a weapon 'from which a projectile or projectiles may be fired by an explosive such as gunpowder.' The State need not introduce the actual deadly weapon at trial; witness testimony alone may provide sufficient evidence." 141 Wn. App. 22, 31, 167 P.3d 575 (2007) (quoting RCW 9.41.10)(citing State v. Bowman, 36 Wn. App. 798, 803, 678 P.2d 1273 (2984); State v. Goforth, 33 Wn. App. 405, 412, 655 P.2d 714 (1982)), review denied, 163 Wn.2d 1049, 187 P.3d 751 (2008)).

shooting Christopher Green and Michael Gradney with a firearm, and one count of unlawful possession of a firearm in the second degree. The crimes charged by the State required a firearm capable of shooting projectiles. At trial, the State presented evidence that Monday discharged a firearm at Francisco Green, Christopher Green, and Gradney and that each was struck by one or more bullets. Because the jury found that Monday used a firearm in the commission of the crimes, it would have necessarily found the firearm was capable of shooting projectiles, whether or not it was provided with the statutory definition of firearm. The jury was entitled to find that Monday was armed with a firearm given the evidence presented at trial. We hold that any error was harmless.

V. Consecutive Sentences

Monday claims the sentencing court's determination that the offenses were separate and distinct, required a jury finding of that fact. The Supreme Court of Washington in State v. Cubias, 155 Wn.2d 549, 551, 120 P.3d 929 (2005), held that consecutive sentences do not implicate Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), or Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Monday asks this court to reconsider Cubias, because "[it] is based on an incorrect interpretation of recent United States Supreme Court law."

A decision by the Washington State Supreme Court is binding on all lower courts in the state. Fondren v. Klickitat County, 79 Wn. App. 850, 856, 905 P.2d 928 (1995). It is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court. 1000 Va. Ltd. P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (citing State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)).

Because the Court of Appeals is bound by Supreme Court precedent and Cubias is on point, we hold that Monday's consecutive sentence was not error.

We affirm.

Appelwick, J.

WE CONCUR:

Grosse, J.

Becker, J.

DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 60265-9-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for ☒ **respondent: Catherine McDowall - King County Prosecuting Attorney-Appellate Unit**, ☒ **appellant** and/or ☐ **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 21, 2009